IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE
Assigned on Briefs December 12, 2006

STATE OF TENNESSEE v. TIMMY LEE HILL

Direct Appeal from the Circuit Court for Marshall County
No. 16539, Robert Crigler, Judge

No. M2005-02437-CCA-R3-CD - Filed on June 20, 2007

A Marshall County Circuit Court jury convicted the appellant, Timmy Lee Hill, of three counts of aggravated kidnapping, two counts of aggravated assault, one count of escape, and one count of evading arrest. The trial court merged the aggravated kidnapping convictions and ordered that the appellant serve an effective forty-year sentence in confinement for all of the convictions. On appeal, the appellant contends that (1) the trial court erred by overruling his Batson challenges during jury selection; (2) the trial court erred by overruling his objection to the State's improper attempt to impeach a defense witness; (3) the evidence is insufficient to support his aggravated kidnapping and aggravated assault convictions; and (4) the trial court improperly sentenced him as a career offender for some of the offenses. Based upon the record and the parties' briefs, we conclude that the evidence is insufficient to support one of the appellant's aggravated assault convictions because the evidence does not show that the victim suffered serious bodily injury. Therefore, the appellant's conviction for that offense is modified to misdemeanor assault, and the case is remanded to the trial court for resentencing as to that offense. The case is also remanded in order for the trial court to reconsider consecutive sentencing and to make several corrections to the judgments. The judgments of the trial court are affirmed in all other respects.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Circuit Court are Reversed and Modified in Part, Affirmed in Part, and Case Remanded.

NORMA MCGEE OGLE, J., delivered the opinion of the court, in which ALAN E. GLENN and D. KELLY THOMAS, JR., JJ., joined.

Hershell D. Koger, Pulaski, Tennessee, for the appellant, Timmy Lee Hill.

Robert E. Cooper, Jr., Attorney General and Reporter; Blind Akrawi, Assistant Attorney General; Charles F. Crawford, District Attorney General; and Weakley E. Barnard, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

I. Factual Background

Sharon Miller testified that in February 2005, she was a correctional officer for the Marshall County Sheriff's Department and worked at the county jail. Miller often worked in the jail's "tower," where the jail's gates were computer-controlled. From the tower, an officer could see down into prisoner cell blocks A, B, C, and D. Miller stated that the only way a prisoner could get from one of the cell blocks into the tower was if a tower officer opened one of the tower's locked doors.

Miller testified that on the morning of February 16, 2005, she was working alone in the jail tower. After the prisoners ate breakfast, Miller followed standard jail procedures by opening the gate to cell block A. A designated inmate from cell block A came out of the cell block and collected the breakfast trays from cell blocks A and B. Miller then let the inmate into the tower to get trash bags and rubber gloves. The inmate got the cleaning supplies, cleaned cell blocks A and B, and returned to cell block A. After the gate to cell block A closed, Miller opened the gate to cell block C so that a designated prisoner could repeat the procedure for cell blocks C and D. Prisoner Tyrone Baugh came out of cell block C, collected the breakfast trays from cell blocks C and D, and came into the tower to get trash bags and rubber gloves. Baugh left the tower and began cleaning the cell blocks. After Baugh started cleaning, he "buzz[ed]" the tower intercom and told Miller that he needed a new glove because he had punched a hole in one of his gloves. Miller looked through a window in the tower door to make sure Baugh was standing outside. She unlocked the tower door so Baugh could come inside, and she walked to a filing cabinet to get the gloves. While she was standing at the cabinet, Miller felt an inmate grab her from behind. He told her, "Don't try anything. I have got a weapon." The inmate turned Miller around, and she saw that it was the appellant.

Miller testified that the appellant made her lie on the floor on her back and that he sat on her stomach, straddling her. He was holding a weapon that looked like a six- or seven-inch nail. The appellant rolled Miller onto her stomach, put a washcloth into her mouth, tied her hands behind her back, and tied her ankles together. He left the tower briefly, returned, untied Miller, and told her to open a gate into the exercise yard. Miller told the appellant that due to construction at the jail, she could not open the gate for him. The appellant retied her hands and feet and put a coat over her head. He then untied Miller's hands, uncovered her head, and told her to open a series of four gates. Each time Miller opened one of the four gates, the appellant retied her hands, left the tower briefly, propped open the newly-opened gate so that it could not close, returned to the tower, and untied Miller's hands so she could open the next gate. After Miller opened the fourth gate, the appellant retied her hands and told her, "Don't do anything funny." He then escaped from the jail.

Miller testified that she was able to free her hands and feet and called out over the jail's intercom, "Escapee, help; escapee, help." She heard Officer Wendy Hagerdon say over the intercom that the appellant had escaped. Miller said that during her altercation with the appellant, her elbow was scraped, she received bruises on her arm, and an earring was torn out of her ear. She stated that the appellant had the weapon in his hand and that she could see only the top of the weapon. She later

learned that the appellant had used a rope made from braided trash bags to tie her hands and feet. On cross-examination, Miller acknowledged that she knew the appellant from her work at the jail and that she had talked with him before.

Corrections Officer Wendy Hagerdon testified that on the morning of February 16, 2005, she was in the jail's "med room" and was packaging prescription medications for the prisoners to take that day. The med room's door was open, and Officer Hagerdon was sitting at her desk. About 7:30 a.m., she saw something orange through a crack in the door and immediately knew that a prisoner was outside in the hallway. The appellant came into the room, hit Officer Hagerdon in her left eye with his fist, and knocked her onto the floor. Officer Hagerdon began kicking and yelling at the appellant, and he hit her again in the eye with his fist. The appellant ran from the room, and Officer Hagerdon yelled for other officers. She stated that as a result of the appellant's assault, she received bruises to her arm and face and went to the Marshall Medical Center for treatment. She said she never lost consciousness.

Betty Chumbly testified that on February 16, 2005, she was the Marshall County Jail Administrator. At the time of the appellant's escape, he was being incarcerated at the jail for a felony conviction. Chumbley stated that she first learned of the appellant's escape about 7:30 a.m. and that she talked with Miller, who was upset and crying. Chumbly saw rope made out of garbage bags on the tower floor.

Marshall County Sheriff's Department Deputy Bob Johnson testified that he was working in a newly constructed part of the jail on February 16 and learned of the appellant's escape about 7:30 a.m. Deputy Johnson talked with some construction workers outside, got into his patrol car, and began searching for the appellant. About 11:45 a.m., Deputy Johnson was dispatched to an area on Yell Road. At the corner of Yell and Cornersville Roads, Deputy Johnson saw an African-American male come out from behind a greenhouse. The man was dressed in white clothing and was wearing a dark hat. Deputy Johnson stated that inmates were allowed to wear white thermal underwear under their orange jumpsuits. Deputy Johnson stopped his car and told the man that he needed to speak with him. The man began running, and Deputy Johnson recognized him as the appellant. He ordered the appellant to stop and radioed to a dispatcher that he was chasing the appellant. Deputy Johnson later learned over his police radio that another officer had found the appellant under a car and that the appellant was running back toward Deputy Johnson's location. Deputy Johnson got back into his patrol car and saw the appellant run toward another officer. The other officer pulled out a police baton, and the appellant surrendered. Deputy Johnson handcuffed the appellant, and the appellant told the deputy to shoot him. Deputy Johnson stated that he did not draw his weapon on the appellant.

On cross-examination, Deputy Johnson testified that when he arrested the appellant, the appellant did not have a weapon. He stated that he never saw anything in the appellant's hands and never saw the appellant throw down an object. On redirect examination, Deputy Johnson testified that he did not see the appellant discard an orange jumpsuit but that the appellant must have discarded the jumpsuit sometime after he escaped from the jail.

Chief Deputy Billy Lamb of the Marshall County Sheriff's Department testified that after the appellant escaped from the jail and was arrested, officers returned the appellant to the jail. While the appellant was in the jail's booking room, the appellant and Deputy Lamb got into an argument over some papers Deputy Lamb would not return to the appellant. About ten minutes later, Deputy Lamb apologized to the appellant for the argument. Deputy Lamb testified that the appellant said that "he understood me being upset, that he assaulted one of my officers."

Lavar Daily, a prisoner in the Department of Correction (DOC), testified for the appellant that he served time with the appellant at the Marshall County jail but was transferred out of the jail in December 2004. Daily said that the tower door was open most of the time, and Daily would see the appellant go into the tower. On cross-examination, Daily acknowledged that he had prior convictions for possessing a controlled substance, theft, multiple automobile burglaries, and over twenty burglaries. He stated that he had seen the appellant go into the tower and stay three to five minutes and that he had not spoken with the appellant since leaving the Marshall County jail in December 2004. Daily said that he had gone into the tower about twenty times and that he would talk with the officers working in the tower. On redirect examination, Daily testified that he had talked only with the appellant's attorney about his testimony, that the appellant's attorney did not ask him to lie for the appellant, and that no one threatened or promised him anything in return for his testimony.

The then forty-six-year-old appellant testified that he met Officer Miller "[t]hrough her working in the tower. Passing out medication." At the end of October or beginning of November 2004, he and Miller began an intimate relationship. He said that he and Miller rarely saw each other but that if she was working alone in the tower, "she would pop the cell block door and call me to the tower, or . . . she is bringing meds, we would talk then when everybody is asleep." The appellant acknowledged that he escaped from the jail, assaulted Officer Hagerdon, and evaded arrest. However, he stated that he was not guilty of kidnapping and assaulting Officer Miller because she helped him escape. He stated that he and Officer Miller planned the escape and that they agreed he would tie her up so that she would not be implicated in the crime and would not lose her job.

The appellant testified that on the morning of February 16, Tyrone Baugh began cleaning cell block D, and the appellant went into the tower and asked Officer Miller if she was "ready to do this." Officer Miller asked the appellant if he was sure no one knew she was involved, and he told her that "no, no, they don't." Officer Miller opened the gates for the appellant, and the appellant told her he was going to tie her up "just enough to where you can untie yourself when I leave." The appellant tied Officer Miller's hands and ankles and walked through the jail hallway. He did not expect to see Officer Hagerdon, panicked, hit her two or three times, and ran out the jail's back door, which Officer Miller had told him was always unlocked. He stated that he did not have a weapon and ran into an alley behind a nearby post office. The appellant took off his jumpsuit, put it in a trash can, and hid until noon. He then jogged along a trail toward Cornersville and turned off of Yell Road. Deputy Johnson saw the appellant, and the police apprehended him. The appellant said he and Officer Miller had been planning his escape for about two and one-half weeks.

On cross-examination, the appellant testified that his relationship with Officer Miller was a "gradual thing," started out as a friendship, and "grew into what it was." He said he and Officer Miller referred to each other as "baby" and expressed "words and feelings" with each other. He stated that he and Officer Miller would talk in the tower about life and personal problems, including Officer Miller's bad marriage. He said that they had sex in the tower one time and that he talked with Officer Miller about her marital problems early in their relationship, prior to December 2004. When asked if he would be shocked to learn that Officer Miller did not get married until December 20, 2004, the appellant said, "No, not really." He said that he did not know if Officer Miller was bruised or if an earring was ripped out of her ear during his escape but that everything he did to her was "agreed upon." He stated that he still cared for Officer Miller and acknowledged that the only proof about his and Officer Miller's escape plan was his testimony.

Prisoner Alvin Beadle testified that he used to be an inmate with the appellant in cell block D of the Marshall County jail. He stated that in the afternoons, all of the inmates would talk to Officer Miller while she was giving out medications. Beadle said that the appellant would talk to Officer Miller and would ask her out and that Officer Miller would "just giggle about it." He stated that he did not observe any other interactions between the appellant and Officer Miller. On cross-examination, Beadle testified that he also knew Lavar Daily, and he acknowledged having a prior conviction for aggravated sexual battery.

Officer Sharon Miller testified on rebuttal for the State that the appellant, Daily, and Beadle were not testifying truthfully and that she did not have sex with the appellant. She stated that the appellant was lying, that he did not discuss his escape plans with her, and that she did not help him escape. She said she married her current husband on December 20, 2004, and was a widow for seven years prior to her current marriage. The jury convicted the appellant of aggravated kidnapping to facilitate felony escape against Sharon Miller (count one), aggravated kidnapping with the intent to inflict serious bodily injury on or to terrorize Sharon Miller (count two), aggravated kidnapping while in possession of a deadly weapon against Sharon Miller (count three), aggravated assault with a deadly weapon against Sharon Miller (count four), aggravated assault by causing serious bodily injury against Wendy Hagerdon (count five), felony escape (count six), and evading arrest (count seven). The trial court merged the three aggravated kidnapping convictions and sentenced the appellant to an effective forty years in confinement for all of the convictions.

II. Analysis

A. Batson Challenges

The appellant contends that the trial court erred by overruling his Batson challenges during jury selection because the State used its peremptory challenges to strike African-Americans from the jury in violation of Batson v. Kentucky, 476 U.S. 79, 106 S. Ct. 1712 (1986) . The State argues that the trial court properly overruled the defense's Batson challenges because the State gave race-neutral explanations for dismissing the jurors. We conclude that the appellant is not entitled to relief.

The record reflects that the appellant and six of the thirty-five potential jurors were African-Americans. Those six potential jurors were Beverly Pirtle, Freda Foxx, Erma Crowell, Tyra Smith, Walter Pardee, and Delwin McLean. During voir dire, the trial court asked the potential jurors if they had been the victim of a crime. Foxx revealed that when she was about thirteen years old, someone in her family was murdered and that a person was prosecuted for the crime; Williams revealed that someone had broken into his home and that no one had been arrested for the crime; and McLean stated that his vehicle had been stolen and that the police should have done more to solve the crime. McLean also said that he and some of his brothers had been arrested previously, and Foxx stated that the Marshall County High School, where she was employed, had been broken into.

The prosecutor asked the panel if anyone was suffering from a medical condition that would prevent them from being able to serve on the jury, and Pirtle stated, "I may not. I am going through menopause real bad." When asked if any of the potential jurors knew the appellant or his family, Crowell, McLean, and Foxx said yes. Crowell explained during a bench conference that she did not know the appellant but knew his aunt and used to work with two of his uncles. She stated that being a member of the jury could cause hardship for her family but that she could be fair. McLean said he had close family ties with the appellant's family and "wouldn't be comfortable being on the jury since I have been knowing him most of his life." Foxx stated that she went to school with the appellant's brother and admitted that she may hold the State to a higher burden of proof to convict the appellant. However, upon questioning by the court, Foxx said she could follow the law. The defense asked the jurors if any of them knew the prosecutor or the police. Crowell stated that she knew the prosecutor, Foxx stated that she had nephews and a niece who worked for the police department, and McLean stated that his brother was a police officer.

The trial court excused McLean from the jury panel for cause. The State moved that the trial court also dismiss Foxx from the panel for cause, but the trial court denied that motion. As its first three peremptory challenges, the State struck Crowell, Foxx, and Pirtle from the panel. The defense objected, arguing that the State had used its peremptory challenges to strike three African-Americans in violation of Batson. The State argued that it did not believe Crowell and Foxx could be fair because Crowell had worked with the appellant's relatives and Foxx went to school with the appellant's family members. Regarding Pirtle, the State said that Pirtle had reported a medical problem and that "I have watched her. She doesn't appear to be paying a whole lot of attention." The trial court ruled that the State had given race-neutral reasons for dismissing the jurors from the panel and overruled the defense's objection.

In the sixth round of peremptory challenges, the State struck Pardee from the panel. The defense objected, again arguing that the State had violated Batson. The following exchange then occurred:

> [THE STATE]: The reason the State has struck Mr. Pardee, I was real impressed with [him] until I started asking him questions. He spoke up real good when the clerk this morning mispronounced

> his name and he corrected her. Had a good voice, a good presence, wearing a pair of bib overalls, which impressed me.
>
> Then I asked a question when I got back to his row: Have you ever been the victim of a crime, and he went on some kind [of] diatribe. It didn't even make sense. I don't think Mr. Pardee is very bright. That is the reason the State is excusing him. It has no bearing on him being black. His appearance irrespective -- we are not counting his skin color -- impressed me. I wanted to keep him until he opened his mouth.
>
> THE COURT: The Court does not have to agree with the State's logic as long as they provide a race neutral reason that has a rational basis in fact.
>
> I do recall from my notes he said he was a victim of a crime, he reported it and I believe it was unsolved. That would be a sufficient race neutral reason for the State to exercise its challenges.

One African-American, Tyra Smith, served on the jury.

A defendant seeking to raise a Batson claim must make a prima facie showing that the State purposefully exercised its peremptory challenge on the basis of race. Batson, 476 U.S. at 93-94, 106 S. Ct. at 1721; Woodson v. Porter Brown Limestone Co., 916 S.W.2d 896, 902 (Tenn. 1996). To make this prima facie showing, the defendant "must establish that a consideration of all the relevant circumstances raises an inference of purposeful discrimination." Woodson, 916 S.W.2d at 903 (citing Batson, 476 U.S. at 97, 106 S. Ct. at 1723). Once the defendant has established a prima facie case of purposeful discrimination, the burden shifts to the State to articulate a race-neutral explanation for the challenge. Batson, 476 U.S. at 97, 106 S. Ct. at 1723. "This explanation must be based on something more than stereotypical assumptions, but it need not rise to the level required to justify the exercise of a challenge for cause." State v. Ellison, 841 S.W.2d 824, 826 (Tenn. 1992) (citing Batson, 476 U.S. at 97, 106 S. Ct. at 1723). If the State provides a race-neutral explanation, the trial court must then consider all the facts and circumstances to determine whether purposeful discrimination has been established. Woodson, 916 S.W.2d at 903. In making its determination, the trial court must carefully articulate specific reasons for each of these findings on the record. Id. at 906. The trial court's factual findings are imperative in this context and will not be set aside on appeal unless clearly erroneous. Id.

In the instant case, the trial court found that the State's first three challenges to the prospective jurors were not discriminatory. We agree. During voir dire, prospective juror Crowell stated that she used to work with the appellant's uncles and knew his aunt and that being a member of the jury could cause hardship for her family. Prospective juror Foxx revealed that she attended school with the appellant's brother and admitted that she may hold the State to a higher burden of

proof. Prospective juror Pirtle told the parties that she was going through menopause and that "I don't think I will be able to sit here." The State had race-neutral bases for challenging these potential jurors.

As to the appellant's Batson challenge for prospective juror Pardee, the State told the trial court that it had dismissed Pardee because he was not very bright and because he "went on some diatribe" in response to a question. From the record, we cannot discern the "diatribe" to which the State is referring. Our review of the voir dire transcript reveals that the State had many conversations with potential jurors. Unfortunately, the court report reporter often did not name the juror with whom the State was speaking. We note that in the appellant's brief, he quotes a voir dire conversation between the prosecutor and a potential juror, claiming that the exchange is the diatribe in question. However, the transcript does not specifically name the potential juror involved in that conversation. Regardless, the trial court concluded that the State had a race-neutral reason for challenging Pardee. Based upon the record before us, we cannot say that this finding is clearly erroneous.

B. State's Cross-examination of Lavar Daily

Next, the appellant contends that the trial court erred by overruling his objection to the State's improper cross-examination of Lavar Daily. He contends that the State's questions insinuated to the jury, without any factual basis to support the insinuation, that the appellant asked Daily to testify untruthfully about seeing the appellant go into the prison tower from time to time. The State contends that the trial court properly overruled the appellant's objection because "Daily [alluded] to someone trying to coach his testimony and the State [was] warranted in flushing that out." We conclude that the appellant is not entitled to relief.

During the State's cross-examination of Daily, Daily testified that he had not spoken with the appellant since being transferred from the Marshall County jail on December 21, 2004. He stated that he had been returned to the Marshall County jail the day before trial to testify for the appellant. The State asked Daily if he had made any telephone calls from the jail and if he knew those phone calls were recorded. Daily answered both questions in the affirmative. The following exchange then occurred:

> Q. Did you make any statements to anybody that [the appellant] was trying to get you to lie for him?
>
> A. No, sir.
>
> Q. Are you sure? What did you say during that phone conversation about your testimony?
>
> A. I just said that -- I told -- my mama asked me why I was here. I said I was supposed to be testifying. I had done told her I was

> going to court about an escape charge. She said what did you have to do with it? You weren't down there or nothing. I said well, I wasn't at the jail at that time but they want me to testify if he had a relationship with Ms. [Sharon]. I said I can't testify to that because I don't know that.
>
> Q. Who was trying to get you to testify to that?
>
> A. I mean this -- nobody wasn't really trying to get me to testify to that. That is just how I felt.

The defense objected and argued during a bench conference that the State's line of questioning was "a little convoluted" unless it had evidence to support its questions. The prosecutor told the trial court, "I was told that the phone call was listened to and [Daily] said they are trying to get him to lie." The prosecutor stated that he had not yet listened to the audiotape of Daily's alleged conversation, and the defense said, "I would like to hear that tape. That is a pretty big accusation." The trial court overruled the defense's objection, stating that the defense could question Daily about the State's accusations during redirect examination. When the State's cross-examination resumed, the prosecutor did not question Daily further about his telephone conversation or the appellant's trying to get him to lie. On redirect examination, Daily testified that he had only talked with the appellant's attorney about this case, that the attorney did not ask him to lie for the appellant, that he was testifying truthfully, and that no one had promised him anything or threatened him in exchange for his testimony.

In our view, the prosecutor's line of questioning was designed to allude to the jury that the State had evidence Daily told someone over the telephone that the appellant was trying to get Daily to lie for the appellant. We question whether the State had any factual basis for the question. During the bench conference, the prosecutor told the trial court, "I haven't listened to the telephone tape yet. I have just been told what it says." The prosecutor did not reveal who told him about the audiotape's contents, and he did not respond when the defense asked to listen to the tape. Interestingly, even though the trial court overruled the appellant's objection, the State did not pursue the matter when it resumed cross-examining Daily. This court has cautioned that "the attempt to communicate impressions by innuendo through questions which are answered in the negative, when the questioner has no evidence to support the innuendo, is an improper tactic." Bolin v. State, 472 S.W.2d 232, 235 (Tenn. Crim. App. 1971). Nevertheless, we conclude that the error, if any, is harmless. See Tenn. R. Crim. P. 52(a); Tenn. R. App. P. 36(b). On redirect examination, the defense asked Daily if he was lying for the appellant. Daily stated that he was telling the truth and that no one had asked him to testify untruthfully. The evidence against the appellant is strong, and we conclude that he is not entitled to relief.

C. Sufficiency of the Evidence

The appellant claims that the evidence is insufficient to support his aggravated kidnapping and aggravated assault convictions. Specifically, he contends that the evidence does not show he is guilty of aggravated kidnapping and aggravated assault against Sharon Miller because she was an active participant in his escape. He also contends, and the State concedes, that the evidence is insufficient to support his aggravated assault conviction against Wendy Hagerdon because the evidence does not show she received serious bodily injury. We conclude that the evidence supports the appellant's convictions for aggravated kidnapping and aggravated assault against Sharon Miller. However, we agree with the appellant and the State regarding the appellant's conviction for aggravated assault against Wendy Hagerdon and modify his conviction for that offense to misdemeanor assault.

When an appellant challenges the sufficiency of the convicting evidence, the standard for review by an appellate court is "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." Jackson v. Virginia, 443 U.S. 307, 319, 99 S. Ct. 2781, 2789 (1979); Tenn. R. App. P. 13(e). The State is entitled to the strongest legitimate view of the evidence and all reasonable or legitimate inferences which may be drawn therefrom. State v. Cabbage, 571 S.W.2d 832, 835 (Tenn. 1978). Questions concerning the credibility of witnesses and the weight and value to be afforded the evidence, as well as all factual issues raised by the evidence, are resolved by the trier of fact. State v. Bland, 958 S.W.2d 651, 659 (Tenn. 1997). This court will not reweigh or reevaluate the evidence, nor will this court substitute its inferences drawn from the circumstantial evidence for those inferences drawn by the jury. Id. Because a jury conviction removes the presumption of innocence with which a defendant is initially cloaked at trial and replaces it on appeal with one of guilt, a convicted defendant has the burden of demonstrating to this court that the evidence is insufficient. State v. Tuggle, 639 S.W.2d 913, 914 (Tenn. 1982).

As to the appellant's claim that the evidence is insufficient to support his convictions for crimes committed against Sharon Miller because she was a participant in his escape, we conclude that the evidence is sufficient to support the convictions. Miller testified about the appellant's grabbing her from behind, threatening her with an object that looked like a six-inch nail, tying her up repeatedly, and ordering her to open prison gates so that he could escape. Although the appellant claimed that he and Miller were having an affair and that she participated in the escape, Miller adamantly denied having sex with the appellant or helping him. The jurors, as was their prerogative, obviously accredited Miller's testimony over that of the appellant. We will not second-guess the factual determination of the jury.

As to the appellant's sufficiency argument regarding his aggravated assault against Wendy Hagerdon, the State alleged in its indictment that the appellant committed aggravated assault against Hagerdon by intentionally or knowingly assaulting her and causing serious bodily injury. See Tenn. Code Ann. § 39-13-102(a)(1)(A). Serious bodily injury is defined in our code as "bodily injury which involves: (A) A substantial risk of death; (B) Protracted unconsciousness; (C) Extreme physical pain; (D) Protracted or obvious disfigurement; or (E) Protracted loss or substantial impairment of a function of a bodily member, organ or mental faculty." Tenn. Code Ann. §

39-11-106(a)(34). During her testimony, Hagerdon testified that the appellant came into the med room and punched her twice in the face with his fist, hitting her in the eye. She said that he knocked her onto the floor and bruised her arm but that she did not lose consciousness. She did not testify as to experiencing any pain. Photographs of Hagerdon taken in the days after the appellant's attack and included in the appellate record show that the appellant blackened her left eye. However, the proof does not show the type of injuries required for serious bodily injury. Nevertheless, the proof is sufficient to establish that the appellant is guilty of assaulting Hagerdon by causing bodily injury. See Tenn. Code Ann. § 39-13-102(a)(1)(A) (defining assault); Tenn. Code Ann. § 39-11-106(a)(2) (defining "bodily injury" as "a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty"). Therefore, we reverse the appellant's count five conviction for aggravated assault and modify it to misdemeanor assault. The case is remanded to the trial court for resentencing as to that offense.

D. Sentencing Range

Finally, the appellant claims that the trial court erred by sentencing him as a career offender. Specifically, he argues that the State's enhancement notice was defective as to two prior felonies and, therefore, that the trial court could not use those two convictions to sentence him as a career offender. The State argues that its notice was adequate. We agree with the State but conclude that the appellant's prior convictions were not sufficient to classify him as a career offender as to the aggravated assaults.

Prior to trial, the State filed a notice of intent to seek enhanced punishment within the time limit set out in Tennessee Code Annotated section 40-35-202(a) and listed the appellant's prior convictions. The list included a prior robbery conviction in Indiana and a 1986 conviction in Marshall County for concealing stolen property over two hundred dollars. At the sentencing hearing, the defense claimed that the State's notice was flawed for two reasons. First, the defense argued that the notice provided the wrong court name and case number for the Indiana robbery conviction. As to the 1986 felony conviction for concealing stolen property, the defense argued that the notice was flawed because that offense is not specifically listed in Tennessee Code Annotated section 40-35-118, the statute classifying felony offenses committed prior to November 1, 1989. The State argued that, at most, the appellant was entitled to a continuance. Regarding the appellant's 1986 concealing stolen property conviction, the State correctly noted that, for the purpose of determining the offense's classification, the conviction was to be considered the same as for receiving stolen property, a Class D felony. See Tenn. Code Ann. § 40-35-118; see also Tenn Code Ann. § 39-3-1112 (1982). The trial court ruled that the notice was not flawed and concluded that the appellant had six prior felonies that classified him as a career offender for the aggravated assault and the escape convictions.

Beth Ladner of the Tennessee Probation and Parole Department testified that she prepared the appellant's presentence report. She stated that in addition to the appellant's numerous prior felony convictions, he also had prior convictions for at least eleven misdemeanor crimes, including driving on a revoked license, driving under the influence, evading arrest, resisting arrest, theft, destruction of private property, and assault. She stated that the appellant had violated his parole

before and that he had been adjudicated delinquent as a juvenile for breaking and entering. She stated that prison records showed he obtained his GED but that she was unable to verify the records. She said that she was unaware of any employment history for the appellant and that he would not give an interview for the presentence report.

The trial court applied multiple enhancement factors, which the appellant does not contest, to the appellant's sentences and ordered that he serve nineteen years at one hundred percent for the aggravated kidnapping conviction as required by Tennessee Code Annotated section 40-35-501(i)(2)(D); fifteen years as a career offender for each aggravated assault conviction; six years as a career offender for the escape conviction; and eleven months, twenty-nine days at seventy-five percent for the evading arrest conviction.[1] The trial court ordered that the appellant serve the sentences for aggravated kidnapping, aggravated assault against Sharon Miller, and evading arrest concurrently with each other. The trial court also ordered that the appellant serve his sentences for aggravated assault against Wendy Hagerdon and escape consecutively to each other and the other sentences for an effective sentence of forty years in confinement.

The only issue the appellant contests regarding sentencing is the trial court's overruling his objection to the State's "flawed" notice to seek enhanced punishment. Tennessee Code Annotated section 40-35-202(a) provides that "[i]f the district attorney general believes that a defendant should be sentenced as a multiple, persistent or career offender, the district attorney general shall file a statement thereof with the court and defense counsel not less than ten (10) days before trial." The statement "must set forth the nature of the prior felony convictions, the dates of the convictions and the identity of the courts of the convictions." Tenn. Code Ann. § 40-35-202(a). The purpose of the notice requirement "is to provide fair notice to an accused that he is exposed to other than standard sentencing." State v. Adams, 788 S.W.2d 557, 559 (Tenn. 1990). If information in the notice is omitted or incorrect, "the inquiry should be whether the notice was materially misleading." Id. Where an ambiguity or contradiction appears on the face of the notice, the defendant has a duty to inquire further. Id. The defendant must show prejudice to obtain relief. Id.

In the instant case, we believe the State's notice substantially complied with Tennessee Code Annotated section 40-35-202(a). Moreover, the record reflects that the State filed its notice on March 7, 2005, almost five months before the appellant's trial. The appellant failed to raise the issue of a defective notice before or during the trial. Although he argued an improper notice at the sentencing hearing, the sentencing hearing transcript demonstrates that he was well-aware of the State's intent to seek enhanced punishment and was not surprised by the State's use of the prior convictions. Finally, even if the notice was defective as to its content, the appellant has failed to show prejudice.

That said, we conclude that the trial court could not sentence the appellant as a career offender for counts four and five, the aggravated assault convictions. Aggravated assault as charged

[1]The appellant elected to be sentenced under the provisions of the Criminal Sentencing Reform Act that went into effect on June 7, 2005.

in this case is a Class C felony. See Tenn. Code Ann. § 39-13-102(d)(1). If a defendant is convicted of a Class C felony and has at least six prior felony convictions of Class A, B, or C, then the defendant should be classified as a "career offender." Tenn. Code Ann. § 40-35-108(a)(1). The State's notice relied on the following prior felony convictions to argue that the appellant was a career offender: robbery in Indiana, a Class C felony; concealing stolen property valued more than two hundred dollars, a Class D felony; forgery, a Class E felony; Class C felony aggravated assault; Class E felony escape; and possession with intent to sell a Schedule II controlled substance, a Class B felony. Given that some of the prior convictions are Class D or E felonies, the appellant could not be sentenced as a career offender for aggravated assault. He is, however, a persistent offender. See Tenn. Code Ann. § 40-35-107(a)(1) (a "persistent offender" is a defendant who has at least five prior felony convictions that are within the conviction class or higher or within the next two lower felony classes). As we stated earlier, this case must be remanded for resentencing as to count five, the appellant's conviction for misdemeanor assault against Hagerdon. On remand, the trial court must also correct the judgment as to count four, the conviction for aggravated assault against Miller, to reflect that the appellant is a persistent, rather than a career, offender.

Furthermore, this case must be remanded to the trial court for corrections to the judgments of conviction for aggravated kidnapping. Although the trial court ordered that the appellant's three aggravated kidnapping convictions be merged and sentenced the appellant to nineteen years for that offense, the trial court entered three separate judgments of conviction. Each judgment reflects a nineteen-year sentence, and none of them refers to the merger order. Therefore, on remand, the trial court is to enter a single judgment of conviction for aggravated kidnapping. See State v. Addison, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997) (providing that if a jury returns guilty verdicts on more than one theory of the offense, then "the court may merge the offenses and impose a single judgment of conviction"). In addition, the trial court is to correct the judgment of conviction for count six, escape, to show that the appellant received a six-year sentence for that conviction, not a fifteen-year sentence as the judgment currently reflects. See State v. Davis, 706 S.W.2d 96, 97 (Tenn. Crim. App. 1985) (where there is a conflict between the judgments of conviction and the transcript, the transcript controls).

Finally, the trial court ordered that the appellant serve the sentence for aggravated kidnapping, aggravated assault (count four), and evading arrest (count seven) concurrently and that the appellant serve his sentences for aggravated assault (count five) and escape (count six) consecutively to the other sentences for an effective sentence of forty years in confinement. Because the trial court found consecutive sentencing to be appropriate for count 5, the conviction we have reversed and modified, the trial court shall have the opportunity on remand to reconsider whether consecutive sentencing is appropriate for the remaining aggravated assault conviction. See State v. Pharez Price, No. M2002-01717-CCA-R3-CD, 2003 Tenn. Crim. App. LEXIS 332, at *29 (Tenn. Crim. App. Apr. 11, 2003) (providing that the trial court's redetermination of consecutive sentencing is appropriate when this court reverses some of the appellant's convictions), perm. to app. denied, (Tenn. 2003); State v. Perry Singo, No. M2001-00919-CCA-R3-CD, 2002 Tenn. Crim. App. LEXIS 677, at **31-32 (Tenn. Crim. App. Aug. 9, 2002) (same), perm. to appeal denied, (Tenn. 2002); cf. State v. Lewis, 958 S.W.2d 736, 740 (Tenn. 1997) (in light of reversing four of appellant's

convictions, supreme court remanded to the trial court for reconsideration of enhancement and mitigating factors).

III. Conclusion

Based upon the record and the parties' briefs, we conclude that the appellant's conviction for aggravated assault against Wendy Hagerdon (count five), must be modified to misdemeanor assault. The case is remanded to the trial court for resentencing as to that conviction, for reconsideration of consecutive sentencing, and for corrections to the judgments consistent with this opinion. The judgments of the trial court are affirmed in all other respects.

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NORMA McGEE OGLE, JUDGE